COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. 35 CENTS PER NUMBER.

DECEMBER, NINETEEN HUNDRED AND SEVEN.

NOTES.

LIMITATIONS ON THE RESERVED RIGHT TO AMEND OR REPEAL CORPORATE CHARTERS.—The purpose of the reserved power clauses was to avoid the effect of the Dartmouth College Case. *Tomlinson* v. *Jessup* (1872) 15 Wall. 454; *Railroad Tax Cases* (1882) 13 Fed. 722. In assigning limits to the power thus reserved—for that it has limits is unquestioned, *Shields* v. *Ohio* (1877) 95 U. S. 319, 324—the courts have found no little difficulty. Thus, privileges which the State gives to the corporation or its members, may, with certain exceptions, see *People* v. *O'Brien, post,* be revoked, even arbitrarily. (Charters repealed) *Griffin* v. *Ins. Co.* (Ky. 1868) 3 Bush 592; *Lothrop* v. *Stedman* (1876) 42 Conn. 583. (Exemption from taxation) *R. R. Co. v. Georgia* (1878) 98 U. S. 359; *Deposit Bank* v. *Daviess County* (1897) 102 Ky. 174. (Eminent domain recalled) *Adirondack Ry. Co.* v. *N. Y. State* (1900) 176 U. S. 335. (Stockholders' freedom from personal liability revoked as to future transactions) *Bissell* v. *Heath* (1894) 98 Mich. 472; *Anderson* v. *Commonwealth* (Va. 1868) 18 Gratt. 295; *Weidenger* v. *Spruance* (1881) 101 Ill. 278. It follows that the State may demand the performance of any act, however oppressive, as an alternative for the revocation of those privileges. *The Mayor* v. *Twenty Third St. Ry. Co.*

(1889) 113 N. Y. 311. Logically, such a demand might include a waiver of constitutional rights. From the State's undoubted power to grant or withhold its privileges originally would follow also its power to grant them subject to an indefinite condition, namely, the right of the State to unlimited future regulations, even though these related to rights and property not originally obtained from the State at all. Cf. *Sioux City Ry. Co.* v. *Sioux City* (1890) 138 U. S. 98. Cases in which this result has been substantially accomplished, *The Mayor of Worcester* v. *Ry. Co.* (1904) 128 Fed. 230; 6 COLUMBIA LAW REVIEW 193; cf. *Sinking Fund Cases* (1878) 99 U. S. 701, would lend much color to the interpretation of the reserved power clauses as such an indefinite condition were it not for the fact that they do assume the existence of limits to the State's power. Some courts have simply deplored the logical extension of a doctrine which would place the corporation entirely at the mercy of the State and its onerous conditions. *People* v. *Ry. Co.* (1883) 52 Mich. 277, 283; *Hinckley* v *Schwarzschild & Sulzberger Co.* (N. Y. 1905) 107 App. Div. 470, 474. Others have attempted to counteract such a tendency by considering certain franchises irrevocable, as property rights protected by constitutional provisions. *Rochester Turnpike Co.* v. *Joel* (N. Y. 1899) 41 App. Div. 43; *People* v. *O'Brien* (1888) 111 N. Y. 1; *Detroit* v. *Detroit Plank Co.* (1880) 43 Mich. 140. Cf. 7 COLUMBIA LAW REVIEW 414. There is little to be said against a limitation of the State's power which will preserve the guaranty of the Fourteenth Amendment. *Opinion of the Justices* (1891) 66 N. H. 629; *Railroad Tax Cases, supra; Matter of Cable Co.* (N. Y. 1886) 40 Hun 1. On the other hand, it has been suggested that the power of the State extends only to the franchises, privileges and immunities which it has previously granted; though as to these it is absolute. 53 American Law Register 1. The cases do not, however, uphold so narrow a view. A middle ground, namely, that all the terms (positive and negative) of the contract between the State and the corporation are subject to the reserved power, appears to be generally consistent with the authorities. *Close* v. *Glenwood Cemetery* (1882) 107 U. S. 456; *Miller* v. *The State* (1872) 15 Wall. 478; *Looker* v. *Maynard* (1900) 179 U. S. 76; *Venner Co.* v. *U. S. Steel Corp.* (1902) 116 Fed. 1012; *Jackson* v. *Walsh* (1892) 75 Md. 304. The cases represented by *People* v. *O'Brien, supra,* are not logically adverse to this position; for the judicial construction of certain franchises as vested property rights brings them within the Fourteenth Amendment, and hence under this view withdraws them from the scope of the reserved power.

In a charter of incorporation but distinct from the contract between the State and the corporation, is embodied a contract between the corporators themselves, 2 Morawetz, Corp. (2nd Ed.) §§ 1046, 1047, which the State uses as a basis upon which to formulate its own contract with the corporation. In the absence of a reserved right to amend or repeal, it is universally held, without invoking the principle of the Dartmouth College Case, that the State cannot impair the obligation of this contract of the corporators *inter se,* any more than it can impair a contract of partnership or any other contract between individuals. Thus, though it may enact or authorize amendments which are merely auxiliary to the purposes of the grant,

1 Thompson, Corp. § 68; *Fry's Executor* v. *R. R. Co.* (Ky. 1859) 2 Metcalf 314, or decree or authorize insignificant and immaterial changes in the corporate design, *Banet* v. *Ry. Co.* (1851) 13 Ill. 504; *Peoria R. R. Co.* v. *Preston* (1872) 35 Ia. 115, it may not enact fundamental amendments without the assent of all the stockholders. *Clearwater* v. *Meredith* (1863) 1 Wall. 25 (consolidation with another road); *Hartford Ry. Co.* v. *Croswell* (N. Y. 1843) 5 Hill 383 (change in nature of enterprise); *Black* v. *Canal Co.* (1873) 24 N. J. Eq. 455 (lease to another corporation); *Mannheim Co.* v. *Arndt* (1858) 31 Pa. St. 317 (change of termini); *State* v. *Greer* (1883) 78 Mo. 188 (change in method of voting). If the subject of the amendment should enter as a term of both contracts, the stockholders' own contract would be subject to any alteration which the State had the power to make as against the corporation, since it was made with reference to the State's contract. *Meadow Dam Co.* v. *Gray* (1849) 13 Me. 547. But if the subject of the amendment were solely confined to the corporators' contract *inter se*, then no reserved clause could give the State the right to impair that contract. If the State passes an act relating to contracts in general, such provisions all form parts of contracts subsequently entered into within that jurisdiction. *Walker* v. *Whitehead* (1872) 16 Wall. 314. But where the State passes an act not prescribing definite terms or regulations, it is not thereby enacting a law, but is reserving a power—a power forbidden to it by Art. I, Sec. 10 of the Federal Constitution. *Goenen* v. *Schroeder* (1863) 8 Minn. 387. It cannot reserve the right to change the contract of the corporators *inter se* any more than it can reserve a general right to change all private contracts. The history of the reserved power clauses in the State statutes and constitutions leads to the same conclusion. *County of Santa Clara* v. *S. P. R. Co.* (1883) 18 Fed. 385. The argument usually advanced in support of the power, that the corporators, by accepting the charter and organizing under it, consent that future legislatures may exercise a plenary right of alteration or repeal, 4 Thompson, Corp. § 5417, would justify the sweeping reservation of the right to alter or annul all private contracts thereafter entered into. See *Charlotte etc. R. Co.* v. *Gibbes* (1887) 27 S. C. 385, 407 (dissenting opinion). It is often difficult to distinguish between those matters which enter only into the corporators' own contract and those which enter also into that of the corporation with the State. The courts have upheld acts making changes in the number of directors which a stockholder was empowered to elect under his original subscription; *Close* v. *Glenwood Cemetery* (1882) 107 U. S. 466; *Miller* v. *The State* (1872) 15 Wall. 478; contra, semble, *City of Louisville* v. *University of Louisville* (Ky. 1855) 15 B. Monr. 642; the method of voting among stockholders; *Looker* v. *Maynard, supra; Gregg* v. *Mining Co.* (1901) 164 Mo. 616; contra, *In Re Newark Library Ass'n* (1899) 64 N. J. L. 217; the internal organization of the corporation; *New Haven R. R. Co.* v. *Chapman* (1871) 38 Conn. 56; *Grobe* v. *Erie Ins. Co.* (N. Y. 1899) 39 App. Div. 183; and the amount of its capital stock; *Buffalo R. R. Co.* v. *Dudley* (1856) 14 N. Y. 336; *Troy R. R. Co.* v. *Kerr* (N. Y. 1854) 17 Barb. 581; *Venner Co.* v. *U. S. Steel Corp.* (1902) 116 Fed. 1012; contra, *Zabriskie* v. *Hackensack R. R. Co.* (1857) 18 N. J. Eq. 178; *Oldtown R. R.* v. *Veazie* (1855)

39 Me. 571, semble; and the number of trustees; *Jackson* v. *Walsh* (1892) 75 Md. 304. All these seem to be alterations of positive terms in the contract between the State and the corporation. Acts changing the kind of capital stock, an example of the alteration of implied negative terms in the same contracts, have also been sustained. *Curry* v. *Scott* (1867) 54 Pa. St. 270; *Hinckley* v. *Schwarzschild & Sulzberger Co., supra.* Changes in the basic nature of the enterprise are supportable on strict logic as alterations of express positive terms in the State's contract. *Buffalo R. Co.* v. *Dudley, supra; White* v. *R. R. Co.* (N. Y. 1853) 14 Barb. 559; *Troy R. R. Co.* v. *Kerr, supra;* contra, *Zabriskie* v. *Hackensack R. R. Co., supra; Kenosha R. R. Co.* v. *Marsh* (1863) 17 Wis. 13. Amendments authorizing leases of the entire property to another corporation, *Dow* v. *Northern R. R.* (N. H. 1887) 36 Atl. 510, or permitting consolidation, *Mowrey* v. *R. R. Co.* (Fed. 1866) 4 Biss. 78; *Mills* v. *R. R. Co.* (1886) 41 N. J. Eq. 1, dictum; contra, *Bishop* v. *Brainerd* (1859) 28 Conn. 289; *Market St. R. R. Co.* v. *Hellman* (1895) 109 Cal. 571; *McKee* v. *Chautauqua* (1904) 130 Fed. 536, are not covered by any term of this contract and are therefore unjustifiable.

The recent case of *Garey* v. *St. Joe Mining Co.* (Utah 1907) 91 Pac. 369 is in accordance with the principles suggested above. A general act of the legislature authorizing a two-thirds majority of the stockholders of a corporation to assess full paid capital stock, which the articles of incorporation had provided should be non-assessable, was held unconstitutional. Accord, semble, *Enterprise Ditch Co.* v. *Moffitt* (1899) 58 Neb. 642; Cook, Private Corps. (5th Ed.) § 497; contra, semble, *Gardner* v. *Hope Ins. Co.* (1869) 9 R. I. 194. Since the amendment related only to the contract of the corporators *inter se*, and not to the contract between the State and the corporation, the case is distinguishable from those cases where a personal liability was imposed on stockholders. *Bissell* v. *Heath, supra.*

Recovery of Taxes Under General Principles of Quasi-Contracts.—The law is well settled that taxes may be recovered if involuntarily paid under an illegal, *Preston* v. *Boston* (Mass. 1831) 12 Pick. 7; *Atwell* v. *Zeluff* (1872) 26 Mich. 118, and not merely irregular, *Wiesmann* v. *Brighton* (1892) 83 Wis. 550; *Carton* v. *Commissioners* (1902) 10 Wyo. 416, assessment, but not if paid voluntarily even though the tax act be unconstitutional. *Otis* v. *The People* (1902) 196 Ill. 542; *Milwaukee* v. *Whitefish Bay* (1900) 106 Wis. 25. Great confusion exists, however, as to what constitutes an involuntary payment. A payment may be clearly involuntary in fact and yet be "deemed voluntary" by the courts. It is usually held that a sufficient legal duress is shown if the payment is made to prevent arrest of person, *Briggs* v. *Lewiston* (1849) 29 Me. 472, or seizure and immediate sale of property. *Babcock* v. *Beaver Creek* (1887) 65 Mich. 479; *Lindsey* v. *Allen* (1897) 19 R. I. 721. Some jurisdictions, however, make the question coextensive with the creation of a cloud upon title, and hence deny recovery if the sale was threatened under a tax invalid on its face. *Montgomery* v. *Cowlitz Co.* (1896) 14 Wash. 230; *Bucknall* v. *Story* (1873) 46 Cal. 589; see *Sowles* v. *Soule* (1886) 59 Vt. 131. In other jurisdictions the better view is taken that a warrant in the hands of an officer who has